LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 4 1972
MICHAEL RODAK, JR., CLERK

No. 70-223

Supreme Court of the United States

OCTOBER TERM, 1971

CENTRAL HARDWARE COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD

and

RETAIL CLERKS UNION, LOCAL 725,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO.

On Writ of Certiorari To The United States
Court of Appeals For The Eighth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005
Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

INDEX

	Page
INTEREST OF THE AFL-CIO	1
ARGUMENT	3
CONCLUSION	21

CITATIONS

CASES:

Amalgamated Food Employees Union v. *Logan Valley Plaza*, 391 U.S. 308 1
Associated Press v. *United States*, 326 U.S. 1 ..... 6, 16
Excelsior Underwear Co., 156 NLRB 236 11
Fafnir Bearing Co. v. *NLRB*, 362 F.2d 716 (C.A. 2) 17-18
Falk Corp., 192 NLRB N. 100, 77 LRRM 1916 16
Ford Motor Co. v. *United States*, 40 L.W. 4352, (March 29, 1972) 13, 17
General Electric Co. v. *NLRB*, 414 F.2d 918 (C.A. 4) 18
Kermarec v. *Compagnie Generale Transatlantique*, 358 U.S. 625 13
Livingston Shirt Corp., 107 NLRB 400 10
Lovell v. *Griffin*, 303 U.S. 444 6
Marsh v. *Alabama*, 326 U.S. 501 13
Martin v. *Struthers*, 319 U.S. 141 19
Monogram Models, 192 NLRB No. 99, 77 LRRM 1913 16
Montor Patriot Co. v. *Roy*, 401 U.S. 265 5
NLRB v. *A. J. Tower Co.*, 329 U.S. 324 5
NLRB v. *Babcock & Wilcox*, 351 U.S. 105 ..... 2, 4, 5, 14, 15, 16, 17
NLRB v. *Burnup & Sims*, 379 U.S. 21 ..... 3-4, 13, 17
NLRB v. *Exchange Parts Co.*, 375 U.S. 405 3
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 275 ..... 4, 13, 17, 19
NLRB v. *Great Dane Trailers*, 388 U.S. 26 20
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 .. 13, 19
NLRB v. *Lake Superior Lumber Co.*, 167 F.2d 147 (C.A. 6) 14

Page

NLRB v. *Solo Cup Co.*, 422 F.2d 1149 (C.A. 7) 15
NLRB v. *United Aircraft Corp.* 324 F.2d 128 (C.A. 2) cert. denied 376 U.S. 851 4
NLRB v. *Virginia Electric Power Co.*, 314 U.S. 469 10
New York Times v. *Sullivan*, 376 U.S. 254 5
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 19
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 6, 7, 10
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 3, 13, 14
Roth v. *United States*, 354 U. S. 476 6
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 18
Schneider v. *State*, 308 U.S. 147 18
Schwartz-Torrence Investment Corp. v. *Bakery Workers*, 61 Cal. 2d 766, 394 P. 2d 192, *cert. denied* 380 U.S. 906 18
Thomas v. *Collins*, 323 U.S. 516 ..... 3, 4
United States v. *Associated Press*, 52 F. Supp. 362, 372 (S.D. N.Y.) *affirmed* 326 U.S. 1 6
Waycross Sportswear, Inc. v. *NLRB*, 403 F.2d 832 (C.A. 5) 18

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73, Stat. 519, 29 U.S.C. §151, *et seq*):
§1 1
§7 ..... 3, 4, 5, 13, 15, 16, 17, 18, 19
§8(a)(1) 2, 3, 19
§8(b)(1) 18
§315, Communications Act of 1934, 47 U.S.C. §315 7
§401(c), Landrum-Griffin Act, 29 U.S.C. §481(c) 7

MISCELLANEOUS:

Barbash, The Practice of Unionism (1956) 9
Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 ..... 7, 11

Page

de Grazia, Of Time, Work & Leisure, (1962) 10

Eldersveld and Dodge, *Personal Contact or Mail Propaganda? An Experiment in Voting Turnout and Attitude Change,* in Katz et al., eds., Public Opinion and Propaganda, 532 (1954) 8

Ginzberg, The Labor Leader (1948) 9

H. Rep. No. 1147, 74th Cong. 1st Sess. 8

Karsh, Seidman, and Lilienthal, *The Union Organizer and His Tactics: A Case Study,* in Barbash, ed., Unions and Union Leadership, 83 (1959) 9

Katz and Lazarsfeld, Personal Influence: The Part Played by People in the Flow of Mass Communications (1955) 7

Key, Politics, Parties, and Pressure Groups (4th ed. 1958) 8, 10

Miller, Problems of Labor (1951) 9

Perkel, *The Failure of Communication in an Organizing Campaign,* 80 Monthly Lab. Rev. 1200 (1957) 9

Seymore, Designs for Fund Raising (1966) 10

U.S. Dept. of Labor, B.L.S. Bulletin No. 1000, *Brief History of the American Labor Movement* 9

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-223

CENTRAL HARDWARE COMPANY, *Petitioner*,
v.
NATIONAL LABOR RELATIONS BOARD
and
RETAIL CLERKS UNION, LOCAL 725,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO.

On Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the NLRB and the Union, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 120 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

In the instant case the National Labor Relations Board (A. 65-70) and the Court of Appeals (A. 74-90) concluded that the principles enunciated in *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308, governed here, and that under those principles the Employer

violated §8(a)(1) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151, *et seq*, by prohibiting the Union access to the parking lots surrounding the Company's stores to communicate with the employees it sought to organize. Both the Board and the court below rejected the Employer's defense based on *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, on the ground that the principles enunciated in that case do not apply at all to union access to areas "generally open to the public [which have] a quasi-public status" (A. 84). The Union has set forth in full and authoritative detail the legal arguments which demonstrate the soundness of the reasoning of the Board and the Court of Appeals. We fully agree with the points made therein; an attempt to restate those arguments would therefore be pointlessly redundant.

There is however, another, and narrower, line of argument that supports the result reached below. The Employer's assumption is that if *Babcock & Wilcox* is applied to open areas no §8(a)(1) violation could be found here. But the Board's undisturbed finding is that there were no "reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29). And under *Babcock & Wilcox* an employer who prohibits union access to his property during an organizing campaign where there are no reasonable alternative channels of communication open to the union for reaching the employees, violates §8(a)(1) of the Act. The burden of the argument developed herein will be to demonstrate that assuming *arguendo* that this case is governed by *Babcock & Wilcox*, the condition for union entry to the store parking lots established in that case was satisfied here, and that the Company's interference with union-employee communication was therefore not excused.

ARGUMENT

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection." As this Court has recognized:

> "These guaranties of national law include the workers' right to organize freely for collective bargaining. And this comprehends whatever may be appropriate and lawful to accomplish and maintain such organization. It include[s] the right to designate any . . . union or agency as the employees' representative. It include[s] their right fully and freely to discuss and be informed concerning this choice, privately or in public assembly. Necessarily correlative [is] the right of union[s] . . . to discuss with and inform the employees concerning matters involved in their choice." *Thomas* v. *Collins*, 323 U.S. 516, 533-534.

Section 8(a)(1) in turn makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." As Mr. Justice Harlan stated for a unanimous Court in *NLRB* v *Exchange Parts Co.*, 375 U.S. 405, 409, "The broad purpose of §8(a)(1) is to establish 'the right of employees to organize for mutual aid without employer intreference';" quoting from *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798, where as here an employer prohibition of the discussion of the right to organize on plant property was held to violate that Section. When "we are concerned with the manner of soliciting union membership" employer action which has the "tendency . . . to weaken or destroy the §8(a)(1) right" is proscribed "even though the employer acts in good faith." *NLRB* v. *Burnup*

& Sims, 379 U.S. 21, 23-24. "[I] is an unfair labor practice to interfere with the exercise of . . . the right to organize guaranteed by §7 . . . unless the employer . . . can show that his action was due to "legitimate and substantial business justifications." *NLRB* v. *Fleetwood Trailer Co.,* 389 U.S. 375, 378.

The plant is the focus of that portion of workers' lives which is most directly affected by the decision to organize, and it is the site at which contact may be established with all the employees "with little expense [and at which the] solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness." *NLRB* v. *United Aircraft Corp.,* 324 F.2d 128, 130 (C.A. 2), *cert. denied* 376 U.S. 851. And the non-working areas, such as the adjacent thoroughfares and parking lots, of the store or plant which is the subject of an organizing campaign are "the place uniquely appropriate and almost solely available" for the exercise of the rights of free communication guaranteed by §7 of the Act. *Republic Aviation,* 324 U.S. at 802 n. 6.

The instant case presents the problem of defining the point at which an employer prohibition of his employees exercise of their "right to be informed . . . of [their] right to organize freely for collective bargaining [and the] correlative . . . right of union[s] . . . to discuss with and inform the employees concerning [that] matter" (*Thomas* v. *Collins,* 323 U.S. at 533-534) on company owned thoroughfares and parking lots during an organizing campaign has a sufficient "tendency . . . to weaken or destroy the § 8(a) (1) right" (*Burnup & Sims,* 379 U.S. at 24) to make out a violation of the Act. This was the problem of *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105, where this Court rejected the Board's *per se* rule which had required an employer to permit non-employee organizers to come into a

plant unless he affirmatively established special circumstances of production and discipline justifying their exclusion. The Court thus adopted a balancing test, in cases to which *Babcock & Wilcox* was applicable, and the question in this case is how that balance shall be struck. We submit that the §7 right of the employees and the union is entitled to prevail unless the opening of the plant or store site to union-employee communication imposes a greater financial cost on the employer than closing that site would impose on the exercise of that §7 right.

1. A campaign to organize is the analogue of a political campaign for office. It is a contest between labor and management over the form of governance of the industrial society of a plant. It culminates in a representation election conducted, pursuant to rules that are consistent with "the whole philosophy of democratic institutions" (*NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330), by the Board, or a less formal substitute therefore. In order to place the labor law issue presented here in proper perspective we therefor begin by outlining the relevant principles which have been developed in regard to the importance of maximizing the opportunities of the parties to a political campaign to reach all those with a stake in that campaign with their message.

(a) The first tenet of our "philosophy of democratic institutions" (*A. J. Tower*, 329 U.S. at 330) is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times* v. *Sullivan*, 376 U.S. 254, 270. This "profound national commitment" to free speech has, of course, its "fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271. Our law has therefore been "fashioned to assure the unfettered interchange of ideas for the

bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484. The ruling presupposition is "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States* v. *Associated Press,* 52 F.Supp. 362, 372 (S.D. N.Y.; L. Hand, J.) *affirmed* 326 U.S.1.

Thus the protection accorded free speech is designed to forward the interests of the society at large; it is not extended simply in the interest of the speaker. As Mr. Justice White emphasized in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390:

> "It is the right of the viewers and listeners . . . which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . [S]peech concerning public affairs is more than self-expression; it is the essence of self-government . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial . . ."

And precisely because the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." (*Associated Press* v. *United States,* 326 U.S. 1, 20), this Court has squarely recognized that "the 'liberty of circulating is as essential to . . . freedom [of speech] as liberty of publishing, indeed, without the circulation the publication would be of little value" (*Lovell* v. *Griffin,* 303 U.S. 444, 452). Since free competition in ideas is the norm there is "no right to an unconditional monopoly of a scarce [communication] resource." *Red Lion,* 395 U.S. at 391. "The unfettered power to make time available only . . . to communicate . . . [one's] own views on public issues, people and candidates" cuts against the democratic grain. *Id.* at 392.

Against this background, it is hardly surprising that "apart from the suppressors of outright dishonesty, no regulatory principle has received wider application in the field of elections than the notion that each side should be given substantial access to the voters," since "the opportunity to reach *all* the [voters] is basic to a fair and informed election." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 92, 99-100. This principle is exemplified by provisions such as §315 of the Communications Act of 1934, 47 U.S.C. §315, providing that equal time be allotted all qualified candidates for office and the fairness and personal attack doctrines developed thereunder (see *Red Lion*, 395 U.S. 367); and by §401(c) of the Landrum-Griffin Act, 29 U.S.C. §481(c), which requires labor organizations "to comply with all reasonable requests" by "any bona fide candidate for office" to "distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization."

Moreover, the great weight of social science authority demonstrates that the variety of methods open for gaining access to potential political supporters are not fungible—the single most important factor in determining the choice of the majority of voters is direct personal contact. As Professors Katz and Lazarsfeld observed in summing up the findings of their classic study of the 1940 presidential election campaign:

> "The one source of influence that seemed to be far ahead of all others in determining the way people made up their minds was personal influence." Katz and Lazarsfeld, Personal Influence: The Part Played by People in the Flow of Mass Communications, 32 (1955).

The experience on the national level is mirrored in local elections. Professors Eldersveld and Dodge compared the respective weights of the written and spoken word in swaying voters and reported:

> "The Ann Arbor data showed the greater effectiveness of a personal interview over sending literature through the mails. . . . The Erie County study also demonstrated the potentiality of personal contact as a source of influence, particularly with regard to those persons who were generally untouched by the mass media." Eldersveld and Dodge, *Personal Contact or Mail Propaganda?; An Experiment in Voting Turnout and Attitude Change,* in Katz et al., eds., Public Opinion and Propaganda 532, 541 (1954).

And Professor V. O. Key, in his highly regarded study of practical politics in the United States, also emphasized the critical human element:

> "Given the bearing of the personal qualities of the candidate on electoral decision, the outcome of an election may be determined by the image of the candidate implanted in the minds of the voters." Key, Politics, Parties, and Pressure Groups 513-14 (4th ed. 1958).

(b) These insights describe an organizing campaign as accurately as a political election. What the candidate and the precinct workers do in personifying their party in the civic election, the organizer and his assistants do, and more, for their union. Since successful union organization can best be promoted by trained persons who devote their full time and knowledge to this task (cf., H.Rep. No. 1147, 74th Cong. 1st Sess. p. 10), the union's most effective voice in these contests is the professional organizer. The organizer is essential because he is experienced in organizing techniques, familiar with the complexities of modern labor law and labor relations, and invulnerable to the discriminatory discipline and discharge which all too frequently be-

falls employees active in a campaign. See A.21 n.11, 29-31, 33-34, 49 n.44; Miller, Problems of Labor, 88-96, 108, 121 (1951), U.S. Dept. of Labor, B.L.S. Bulletin No. 1000, *Brief History of the American Labor Movement,* 44-47 (1950). Professors Karsh, Seidman, and Lilienthal state a basic truth when they note:

> "The union, to workers in an isolated small town [we would add: to workers in any unorganized milieu], is an abstraction, of which the organizer is the only tangible embodiment. . . . Therefore his personality becomes important, for he sells himself along with, and perhaps as much as, his union; he must inspire confidence and be the kind of person the workers admire and like to be friendly with." Karsh, Seidman, and Lilienthal, *The Union Organizer and His Tactics: A Case Study,* in Barbash, ed., Unions and Union Leadership 83, 94-95 (1959). *See, also,* Ginzberg, The Labor Leader, 92, 98, 103-04 (1948); Perkel, *The Failure of Communication in an Organizing Campaign,* 80 Monthly Lab. Rev. 1200, 1201 (1957), *cf* Barbash, The Practice of Unionism, 39 ff. (1956).

Moreover, if the organizer does not reach the employees before they leave the plant or store site it is extraordinarily unlikely that he will be able to establish personal contact with more than a fraction of them. Even when there are public walkways in front of a plant which are open to solicitation, this point of contact is relatively useless because an ever higher percentage of employees drive to work and park on the employer's property. The problems become nearly insurmountable thereafter, for the sub-group sought to be reached, the workers of a particular plant, melds into the general population. This makes house-to-house solicitation extremely expensive in terms of results per dollar and man-hour, since the union as opposed to religious, charitable, or political organizations is interested in reaching only the

unorganized worker rather than the population at large. Indeed, even under the best of circumstances, as professional fund raisers have discovered, while it is more satisfactory than no personal contact at all "most house-to-house canvassing is relatively sterile" when compared to solicitation in a group context. Seymore, Designs for Fund Raising, 76 (1966).

Finally, it is most unlikely that union meetings at a public or union hall will be adequate to establish contact with all the employees involved, especially those who have not had any prior contact with organized labor's message. Sebastian de Grazia, in his 20th Century Fund Study on work and leisure in this country, concluded that the average worker has only one hour of free time a day. de Grazia, Of Time, Work & Leisure 96 (1962). To expect the union meeting to win an appreciable number of the undecided away from recreational activity is literally to expect the impossible. And of course urban sprawl and congestion intensifies all of these problems.

In contrast, the employer's right to personally present his views to all his employees is assured under present Board law since it is lawful for him to assemble and address them on company property during company time without according the union the right of reply. *Livingston Shirt Corp.*, 107 NLRB 400; *see NLRB* v. *Virginia Electric Power Co.*, 314 U.S. 469; compare *Red Lion*, 395 U.S. at 390-392. Such speeches are perhaps the single most effective method of presenting a political message:

> "The radio and TV are no substitute for the old-fashioned political rally where the candidate can be seen and heard . . . The psychological evidence indicates that individuals in crowds are rendered suggestible. The applause picks up the doubters in the audience and carries them along." Key, *supra*, at 527.

(c) The instant case provides a compelling illustration of the proposition that the first requisite of "a fair and informed election" the "opportunity to reach *all* the employees" (Bok, *supra*, 78 Harv. L. Rev. at 99-100) through direct personal contacts by the union organizer is seriously undercut when the plant or store site is closed to the union.

At the inception of the organizational campaign the Union did not have a list of the employees' names and addresses (A. 195).[1] By the time the parking lot was closed to it, the Union had compiled a list which it estimated to be about 80 percent complete (A. 26). At that point the accuracy of the list "dissipated because we were not allowed . . . on the parking lot, to have access . . . to the . . . new employees that they hired in. . . . When [access] ceased, then we could not . . . keep an up-to-date record" (A. 197-198).

Home calls alone proved inadequate (A. 26-27). There was substantial difficulty in finding the homes of employees who lived in rural areas surrounding Indianapolis. Furthermore, the employees were absent more often than not when the Union's representatives called, the ratio being five or six attempted visits for each time the employee was actually found at home. And, of course no contact was possible with those whose names and addresses had not been obtained.

Communicating with the employees at the points through

[1] The ruling in *Excelsior Underwear Co.*, 156 NLRB 236, which alleviates the difficulties described above to some extent by providing a list of names and addresses during the period after a Board-ordered election, had no application here. For it is, of course, of no help during the initial stages of the campaign when the organizing effort must gain supstantial support or be abandoned. Indeed, the *Excelsior* list has only a marginal effect on the substantial costs entailed in an extensive program of house visits, the sole union alternative for reaching all the employees personally if the plant site is closed.

which they entered and left the store parking lot by automobile was not feasible (A. 27-28, 24). Only three of the eight access points to both stores which the employees used provided safe places to stand. Moreover, it would have been all but impossible, even at those three, to distinguish the cars in which the employees rode from those of other people in time to attempt to stop the employees' cars. Finally, communication at these points would have resulted in traffic congestion, with lines of automobiles backing up into parking lots on leaving from work, and traffic tie-ups on the surrounding roads on arrival to work.

Newspaper, radio, and television advertising was not feasible (A. 28). In the Indianapolis area, there are two newspapers of general circulation in which the Company advertises its products, forty so-called neighborhood newspapers, four television stations, and fifteen radio stations. The Union therefore would not have been able to select channels of mass media communication to reach the employees effectively and at a cost commensurate with the size of the relevant audience.

Finally, meetings on the streets were not feasible (A. 28-29). Indianapolis is a substantial metropolitan community. The employees live in various sections of the city and its surrounding towns. Accordingly, it was quite unlikely that representatives of the Union would have, or could have been expected to, meet any significant number of the Company's employees on the streets.

As the Board quite properly found, there were "no reasonable means available to nonemployee representatives of the Union to reach . . . [the Company's] employees with its organizing message other than by having those representatives meet them on . . . [the Company's] parking lots" (A. 29).

2. The major purpose of the Act is, in the words of § 1, to "encourag[e] the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing." Accordingly, employer action which would "weaken or destroy" §7 rights (*Burnup & Sims*, 379 U.S. at 23-24) without "legitimate and substantial business justification" (*Fleetwood Trailer Co.*, 389 U.S. at 378) is prohibited. The Act was intended to, and has the effect of, reducing the common law powers and perquisites of employers. The most notable instance is the restriction it imposes on their right to hire and fire for good reason, bad reason or no reason at all. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46. But this is not the full extent of the Act's effect.

The Board and this Court have been quick to perceive that it was in Congress's contemplation that "inconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining." *Republic Aviation*, 324 U.S. at 802 n. 8. In the NLRA context as in maritime law, common law property concepts, whose roots may be traced "to a heritage of feudalism" are not controlling "in an industrialized urban society." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 631-632. The rights of an employer who "opens up his property" to employees covered by the Act are "circumscribed by [their] statutory . . . rights . . . Cf. *Republic Aviation Corp.* v. *National Labor Relations Bd.*, 324 U.S. 793, 796." *Marsh* v. *Alabama*, 326 U.S. 501, 506. For "even constitutionally protected property rights . . . may not be used as levers for obtaining objectives proscribed by" federal law. *Ford Motor Co.* v. *United States*, 40 L. W. 4352, 4357 n. 10 (March 29, 1972).

In light of these principles, it has been settled from the

first, that the non-working areas of a store or plant may not be closed to employee solicitors and handbillers, even though other channels of communication may be open, unless there are special circumstances which require restrictions in order to maintain production or discipline (*Republic Aviation*, 324 U.S. 793); and that non-employee organizers have the right to communicate with employees on company property when the employees both live and work there (e.g., *NLRB* v. *Lake Superior Lumber Co.*, 167 F.2d 147, 150-151 (C.A. 6)).

The course of law regulating union-employee contact on plant premises in other situations has not been so smooth. Initially the Board took the view that non-employee organizers were entitled to the same degree of protection in utilizing plant or store property for communication as employees. In *Babcock & Wilcox* this Court rejected the Board's view because it "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees" (351 U.S. at 113). It instructed the Board that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" (351 U.S. at 112). For:

> "This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility

> of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Ibid.*

Thus *Babcock & Wilcox* stands for the proposition that a naked demand by a union for access to company property, standing alone, is not sufficient to overcome the employer's right to exclude "strangers" from his property, since, in theory at least, the exclusion may not constitute an "interference" with the organizing effort if there are other available channels of communication. But *Babcock & Wicox* does not embrace the opposite extreme—that the employer's naked title is always superior to the §7 right of unions to communicate with employees. "This is not a problem of always open or closed doors for union organization on company property" (351 U.S. at 112). What is required is an "accommodation" between the employers' right to exclude and the §7 communication right of employees and unions which works "as little destruction of one as is consistent with the maintenance of the other" (*Ibid*).

But the Board and the Courts of Appeals have not, with rare exceptions such as the instant case, applied the calculus of "accommodation" called for in *Babcock & Wilcox*. The result has been the creation of an all but impenetrable barrier to access. As the Seventh Circuit has candidly observed, the Board and the Courts of Appeals "have been reluctant to find no reasonable means of solicitation except on company property and have upheld 'a union's right of access * * * only when a substantial nuber of the employees reside on company property.'" *NLRB* v. *Solo Cup Co.*, 422 F.2d 1149, 1151 (C.A. 7). No showing of difficulty short of complete impossibility, and

no demonstration of added expense no matter how prohibitive, has been sufficient to overcome this presumption of non-access. E.g., *Monogram Models*, 192 NLRB No. 99, 77 LRRM 1913; *Falk Corp.*, 192 NLRB No. 100, 77 LRRM 1916. Since the number of cases in which the "employees reside on company property" (*Solo Cup*, 422 F.2d at 1151) is miniscule, in practical terms this result accomplishes the total "destruction" of the § 7 rights at stake despite *Babcock & Wilcox's* explicit declaration (351 U.S. at 112) that they were to be respected.

The draconian conclusion that, except for the situations presented by isolated lumber camps and resort hotels no showing of difficulty or expense is sufficient to gain the union entry seriously undercuts § 7 rights. As already demonstrated (pp. 8-10 *supra*), normally this rule precludes personal union contact with all those it seeks to organize despite the fact that employers have an assured right to get their message to every one of their employees. And, of course, as the cost to unions of making contact goes up the total number of contacts must inevitably go down. For union resources are severely limited. Despite the commitment to the "widest possible dissemination of information" (*Associated Press*, 326 U.S. at 20) the virtually irrebuttable presumption the Board and the Courts of Appeals have evolved might be justified if it were based on the conclusion that the costs of permitting greater access outweighed the costs of non-access. But no such inquiry has even been attempted. Indeed, the Board has airily dismissed its relevance on the ground that "the test established [in *Babcock & Wilcox*] was not one of relative convenience." *Monogram Models*, 77 LRRM at 1914.

This reading of *Babcock & Wilcox* is, we submit, patently wrong. "Relative convenience" is the essence of

the "accommodation" process required by *Babcock & Wilcox*. For it is plain that property rights are not of a higher order than §7 rights. "Even constiutionally protected property rights may not be used as levers for obtaining objectives proscribed" by federal law. *Ford Motor Co.*, 40 L.W. at 4359 n. 10 And, as squarely recognized in both *Republic Aviation* and *Babcock & Wilcox*, the Act was intended to regulate employer property rights when those rights are used to "weaken or destroy" §7 rights (*Burnup & Sims*, 379 U.S. at 23-24) without "legitimate and substantial business justification" (*Fleetwood Trailer Co.*, 389 U.S. at 378). This being so it would be irrational to allow the employers' interest in exclusion to prevail in cases in which it can be established that the injury to § 7 rights occasioned by that exclusion is greater than the injury to his interests occasioned by allowing entry. In such cases the only proper conclusion is that requiring the union to utilize other "available channels of communication . . . to reach the employees" is to require an unreasonable, rather than a "reasonable effort." *Babcock & Wilcox*, 351 U.S. at 112.

The calculus for determining when entry is to be allowed is readily at hand. The balance is to be struck, we suggest, by weighing the financial cost to the employer of allowing entry against the increased cost to the union of establishing personal contact with all of the employees off the plant site. This calculus derives from the decisions in the closely analagous situation of union access to the plant to make time and motion studies in furtherance of its collective bargaining responsibilities. As Judge Kaufman explained in the leading case of *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716, 721 (C.A. 2):

> "On the evidence and findings presented in this proceeding, we believe the Board, exercising its expertise and special competence, could properly deter-

mine that the Union's need to conduct these tests outweighed the Company's interests in closing its doors to outsiders. Cf. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Of course, we are not to be understood as saying that if the Company had established that Union-conducted studies would have severely disrupted production, see Note, 17 Stan. L. Rev. 507 (1965), we would not have a significantly different case; but, we shall defer judgment on such a situation until another day." Accord: *General Electric Co.* v. *NLRB,* 414 F.2d 918, 922-923 (C.A. 4); *Waycross Sportswear, Inc.* v. *NLRB,* 403 F.2d 832, 836 (C.A. 5).

Certain potential complications can be excluded at the outset. The first is the intangible, and hence immeasurable, value of the right to exclude at will on the one hand and the §7 right to communicate on the other. This is entirely fair to employers, for the proposition that the intangible value of the right to exclude at will pursuant to "a property right worn thin by [a] public usage" (*Schwartz-Torrence Investment Corp.* v. *Bakery Workers,* 61 Cal 2d 766, 394 P. 2d 921; *cert denied* 380 U.S. 906), the employer has encouraged for his own profit, is greater than the value of freedom of speech which "this court has characterized . . . as a fundamental personal right and libert[y] . . . vital to the maintenance of democratic institutions" (*Schneider* v. *State,* 308 U.S. 147, 161) is untenable. The second is the employers' interest in profitable production and sound discipline. The right sought is access to non-working areas, such as parking lots and walkways, pursuant to reasonable rules, and not unlimited access. We accept the proposition that employers are free to adopt "reasonable . . . regulations 'in the interest of plant efficiency and discipline'" (*Babcock & Wilcox,* 351 U.S. at 108), and that both §8(b)(1) and state law (see *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236) are available to deal with disorderly

or obstructive methods of communication. The third is the employers'. interest in insulating his employees from the unions message on the ground that it is, or may be, offensive to some of them. But this is not a legitimate interest. It is the very interest that §§7 & 8(a)(1) were enacted to override; for it is antithetical to the employees' right to organize, which is "fundamental," (*Jones & Laughlin*, 301 U.S. at 33). The NLRA, no more than the First Amendment, recognizes in one party the right to exclude an expression of views by the other. As the Chief Justice said last term in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419: "The views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet the standards of acceptability." See also *Martin* v. *Struthers*, 319 U.S. 141, 143-147.

This leaves on the employers' side the cost of enforcing the reasonable regulatory rules to control union-employee communication on the plant site, and on the union side the increased cost of reaching all the employees sought to be organized away from that site. These costs fairly evaluate the substantial interests at issue. Where entry imposes an insubstantial financial burden on him the employer has not demonstrated a "legitimate and substantial business justification" for exclusion. See *Fleetwood Trailer Co.*, 389 U.S. at 378. Where non-access imposes minimal burdens on it the union has failed to demonstrate employer interference with the organizing campaign. Where the cost are significantly greater on one side than the other "accommodation" requires that the party bearing the lesser cost give way. And where the costs are relatively in balance, we believe (although it is not remotely presented here) that proper deference to the powers of Congress indicates that the statutory right should prevail.

We would be less than candid if we did not state that the suggested rule advanced here would most probably open company property to unions on many occasions. But this is not because the rule is not even handed; it is because in fact, as opposed to theory, the real costs to the union of pursuing alternative channels of communication are normally higher than the real costs to the employer of allowing entry.

The instant case is instructive. The evidence already discussed (pp. 11-12 *supra*) demonstrates the substantial costs the Union incurred once the parking lots were closed to it. On the other hand the Employer has not pointed to a single consideration tending to demonstrate that entry imposed any costs whatsoever upon him. Indeed, in light of the fact that the parking lots here were open, unobstructed and unpoliced, and the employees parked in a separate area to the side of the store (A. 24-25), it is difficult, if not impossible, to imagine how such a showing could have been made. The evident truth of the matter is that the Employer's concern was not to protect an interest in privacy, or in being free to carry on its business without physical obstruction, but simply to utilize another means at hand to prevent the exercise of §7 rights. Compare A. 21 n. 11, 29-31, 33-34, 49 n. 44. This being so, it is plain that the Board was correct in holding that the Company violated §8(a)(1) of the Act by excluding the union organizers from the parking lot. Cf. *NLRB* v. *Great Dane Trailers*, 388 U.S. 26.

CONCLUSION

For the foregoing reasons as well as those stated by the Union and the NLRB the decision below should be affirmed.

Respectfully Submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005
Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

April, 1972